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Andrea D. Lyon

Hannah J. Brooks

Stepping Towards Justice: The Case for the Illinois Constitution Requiring More Protection than Not Falling Below "Cruel and Unusual" Punishment

BY ANDREA D. LYON[*] AND HANNAH J. BROOKS[**] [***]

In these tumultuous times, when our nation is trying to not only navigate a global pandemic, but also actually reckon with its long history of institutional racism, mass incarceration, and devastation of poor communities and communities of color, the cry for criminal justice reform is loud and getting louder, particularly regarding sentencing, and it is time for Illinois to require its courts to commit to doing more in accordance with our constitution.

It is time for Illinois courts to permanently commit to doing more, to follow the dictates of its own constitution and, in sentencing, take seriously its directive of acting with the goal of returning an offender to useful citizenship. Illinois courts should now seek to uphold the promise of our Illinois Constitution regarding sentencing:

> *All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.*[1]

In this article, the authors examine the legislative and constitutional history of Illinois, the effects of a series of recent decisions made in the context of the sentencing of juveniles, and the applicability of family law norms

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* Andrea D. Lyon is a renowned lawyer, author, speaker, professor, and former Dean of the Valparaiso University Law School who has been featured on national news and media outlets. Dubbed "The Angel of Death Row" by the Chicago Tribune, she was the first woman to serve as lead attorney in a death penalty case, and she holds an unparalleled nineteen wins in nineteen capital cases. *Legal Defense from Lyon Law*, LYON LAW, https://www.andrealyon.com/ [https://perma.cc/26B4-ZM2K].

** Hannah J. Brooks is an attorney, professor, speaker, and international academician who has presented at the Oxford Women's Leadership Symposium in England and drafted heads of argument for the landmark human rights case *LeGaBiBo* in Botswana. She continues her advocacy and research efforts in Chicago, Illinois.

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1. Ill. Const. art. I, § 11.

to sentencing decisions. The authors argue that Illinois courts should have to make findings of how their sentences comport with the Illinois Constitution and advocate for those representing the accused to ask for those findings and to present evidence in support of sentences which have the goal of returning an offender to useful citizenship.

Table of Contents

I. INTRODUCTION

When Javier[2] was born, he was the third to last of the nine children of his mother, Carmen, and her husband, Carlos. Carlos left just before his last child was born. Carlos was an alcoholic, and he had been violent towards his children and his wife for years. He had been in minor trouble with the law, but had been able to work pretty steadily and thus support his family. When he left, though, that all fell on Carmen.

Javier stuck close to his mother, sometimes sneaking into the back seat of the car at night when she would go to her second job cleaning offices, so he could be with her. He craved attention and would act out to get it. He had trouble concentrating in school and was way behind in reading. Then disaster struck. His mother was diagnosed with cancer when he was twelve, and by the time he was thirteen, Javier was running the streets. Wanting to belong somewhere—anywhere—he looked up to an older sister's boyfriend who was a Latin King. By age fourteen, Javier's mother had passed, and he was a member of the gang. Javier was required to shoot at someone in order to become a member. He did so without hitting anyone, but shortly after his fifteenth birthday, he was assigned to accompany Mario, a new recruit, to witness that Mario shoot at someone in rival gang territory. Mario's shot didn't miss and Alfonso Garcia, nineteen, died that night. Javier was arrested and confessed to having been there. He had no idea that this made him legally

2. The client and associated names have been changed.

responsible for Mario's actions. He was automatically tried as an adult because first degree murder required an automatic transfer at age fifteen to adult court.[3] He was found guilty and sentenced to a total of fifty-one years, with a release date when he would be sixty-five years old.[4] In other words: for the rest of his life.

It is sentences like these that have caused Illinois courts to begin to take into account the differences between children and adults in sentencing, and to begin to set up criteria which require more than not falling below the minimum of a punishment not being "cruel and unusual" under the Eighth Amendment. It is time for Illinois courts to do more, to follow the dictates of its own constitution and, in sentencing, take seriously its directive of acting with the goal of returning an offender to useful citizenship.

In these tumultuous times when our nation is trying to actually reckon with its long history of institutional racism, mass incarceration, and the concomitant devastation of poor communities and communities of color, it is time for Illinois to require its courts to live up to the promise of the Illinois Constitution regarding sentencing:

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.[5]

As a general matter, Illinois courts have interpreted this part of the state's constitution in lockstep with the United States Supreme Court's interpretations of the Eighth Amendment to the United States Constitution's prohibition against "cruel and unusual" punishment.[6]

This interpretation has started to change, though, as Illinois has begun to seriously reassess its position on sentencing in light of the major decisions on that subject from both the United States Supreme Court and the Illinois

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3. That has changed and now a fifteen-year-old would at least get a transfer hearing, although sixteen and seventeen-year-old children do not. 705 ILL. COMP. STAT. 405/5-130(1)(a) (2016).

4. In the recent decision in *People v. Buffer*, 137 N.E.3d 763 (Ill. 2019), the Illinois Supreme Court recognized that the mandatory sentencing of children to a minimum of forty-five years was a de facto life sentence and remanded a number of cases, including Javier's, for resentencing.

5. ILL. CONST. art. I, § 11.

6. The proportionate penalties clause in the Illinois Constitution is interpreted in lockstep with the federal constitution's prohibition against cruel and unusual punishment. People ex rel. Birkett v. Konetski, 909 N.E.2d 783, 799 (Ill. 2009). Both provisions apply only where the government has inflicted a penalty upon a criminal defendant. People v. Boeckmann, 932 N.E.2d 998, 1007 (Ill. 2010).

Supreme Court. This important reassessment started in 2012 when the United States Supreme Court held in *Miller v. Alabama* that a juvenile convicted of homicide cannot be sentenced to life imprisonment without the possibility of parole unless the trial court first considers the principles and purposes of juvenile sentencing as well as the minor's special circumstances.[7] The *Miller* holding does not bar a life sentence without parole in all cases, but limits such sentences to juvenile offenders whose crimes reflect "irreparable corruption."[8]

Following *Miller v. Alabama*, in 2017 the Illinois Supreme Court held in *People v. Holman* that the Eighth Amendment prohibits mandatory life sentences for juveniles who commit murder based on the concept that juveniles are less mature and responsible than adults and are more vulnerable to negative influence and peer pressure.[9] The court held that in Illinois, any life sentence imposed on a juvenile, whether mandatory or discretionary, violates the Eighth Amendment unless the trial court considered youth and its attendant characteristics.[10] Thus, an Illinois court may sentence a juvenile defendant to life without parole only if the minor's conduct shows irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation.[11] In making this determination, the trial court must consider: (1) defendant's youth and attendant circumstances including chronological age, any evidence of particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) defendant's family and home environment; (3) the degree of defendant's participation in the offense and any evidence of familial or peer pressures that may have affected him; (4) defendant's incompetence, including his inability to deal with police officers or prosecutors or his own attorneys; and (5) defendant's prospects for rehabilitation.[12]

While the outcome of *Holman* might seem to indicate that Illinois is once again in lockstep with the United States Supreme Court, the language of current Illinois law shows a willingness to protect juvenile offenders even more than the United States Supreme Court precedent requires. In the 2019 decision of *People v. Buffer*, the Illinois Supreme Court analyzed United States Supreme Court precedent and came to the conclusion that a de facto life sentence was any sentence more than forty years.[13] The question of what was a de facto life sentence had not been addressed by the United States Supreme Court, but Illinois chose to do so in *Buffer*:

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7. Miller v. Alabama, 567 U.S. 460, 465 (2012).
8. *Id.* at 479-80.
9. People v. Holman, 91 N.E.3d 849, 859-60 (Ill. 2017).
10. *Id.* at 861.
11. *Id.* at 863.
12. *Id.*
13. People v. Buffer, 137 N.E.3d 763, 774 (Ill. 2019).

> In *People v. Reyes*, 2016 IL 119271 (*per curiam*), this court addressed one of these parameters. Although the Supreme Court has not yet weighed in on the issue, we concluded in *Reyes* that the *Miller* rule also applies to mandatory *de facto* life sentences without the possibility of parole. In *Reyes*, the defendant was sentenced to a mandatory term of 97 years, with the earliest possible release after 89 years. The State conceded that the defendant's sentence was unquestionably the functional equivalent of a mandatory life. . .[14]

Illinois has previously, in another context, been willing to require more than the floor below which it may not fall. The state did so by recognizing a stand-alone innocence claim in collateral review.[15] In *People v. Washington*, the Illinois Supreme Court held that post-conviction petitioners are permitted to raise freestanding claims of actual innocence, because they are rooted in both procedural and substantive due process rights.[16] Illinois recognizes a stand-alone innocence claim in collateral review through its post-conviction process;[17] federal courts do not.[18]

It is clear that Illinois courts may choose to require more than simply not falling below the proscriptions of the Eighth Amendment to the United States Constitution. Courts "may interpret provisions of the Illinois Constitution more broadly than analogous federal constitutional provisions."[19] Because we know so much more about the effects of trauma, poverty, and lack of resources on the immature mind, and because we need to stop trying to "build our way" out of those problems by simply imprisoning people without regard to what our Constitution says we should do, the time has come to require more. Article I, § 11 of the Illinois Constitution requires the sentencer to mete out a sentence that takes into account the seriousness of the crime "with the objective of restoring the offender to useful citizenship."[20] As the recent moves to do just that with juvenile sentencing show, Illinois can do more than the minimum, and it should.

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14. *Id.* at 776 (Burke, J., concurring) (citations omitted).
15. People v. Washington, 665 N.E.2d 1330, 1336 (Ill. 1996).
16. *Id.*
17. *Id.*; *see also* 725 ILL. COMP. STAT. 5/122-1(c) (2019).
18. *See* Herrera v. Collins, 506 U.S. 390 (1993).
19. People v. Emerson, 727 N.E.2d 302, 321 (Ill. 2000).
20. ILL. CONST. art. I, § 11.

II. HISTORY OF THE ILLINOIS CONSTITUTION'S ARTICLE I, § 11

The first Illinois Constitution, drafted in 1818, was a requirement for statehood.[21] The proportionality clause was present in that Constitution.[22] At the request of the territorial legislature, Congress authorized the election of thirty-three delegates to a convention to form a state constitution and government.[23] The First Illinois Constitutional Convention drafted, debated, and adopted a proposed constitution in three weeks.[24] Two additional conventions occurred, one in 1848 and one in 1870. Then for 100 years, the Illinois Constitution remained nearly untouched, until the 1970 Convention, which resulted in the Illinois Constitution in its current version.[25]

The initial language of the proportionality clause appears to have been modeled off of the state constitution of New Hampshire: "All penalties shall be proportioned to the nature of the offense, the true design of all punishment being to reform, not to exterminate mankind."[26] Illinois appears to have used a condensed version of the New Hampshire text in its 1818 and 1848 Constitutions, and the language was similar to that used in the 1870 Constitution.[27]

Between 1870 and 1970, there may have been a century with little change in constitutional language, but courts were by no means stagnant in their interpretation of the clause. For example, Illinois developed a "shock the moral sense of the community" analysis in the late nineteenth century,[28] and the Illinois Supreme Court first articulated a standard construction of this clause in *People ex rel. Bradley v. Illinois State Reformatory*, where the court set a three-pronged test for judging proportionality challenges:

> When the legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel and unusual, or not proportioned to the nature of the offense, unless it is a cruel or degrading punishment, not

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21. James W. Hilliard, *The 1970 Illinois Constitution: A Well-Tailored Garment*, 30 N. ILL. U. L. REV. 269, 295 (2010).

22. Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 817 (2008).

23. Hilliard, *supra* note 21, at 293.

24. *Id.* at 294.

25. *Id.* at 343.

26. ILL. CONST. of 1818, art. VIII, § 14; *see* N.H. CONST. of 1784, art. XVIII, pt. I.

27. *See* ILL. CONST. of 1818, art. VIII, § 14; ILL. CONST. of 1848, art. XIII, § 14.

28. Sean Kiley, *Criminal Procedure: Proportionate Penalties-Judging Proportionality Without Comparison: A Criminal Defendant May Not Challenge a Penalty Under the Proportionate Penalties Clause by Comparing It to the Penalty for an Offense with Different Elements*, 37 RUTGERS L.J. 1337, 1340 (2006).

> known to the common law, or is a degrading punishment which had become obsolete in the State prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community.[29]

The court's examination of "shock to the moral sense of community" laid the foundation from which courts have tested Illinois's proportionality clause in comparison to the Eighth Amendment's cruel and unusual punishment clause. Even without a change to the language of the Constitution, courts shifted the case law based on changes in moral and social norms. For example, in 1916, a sentence was imposed for seventy-one counts of illegal alcohol sales that occurred shortly after an Illinois town became an anti-saloon territory, and this was deemed proportionate to the crime, reflecting the statute that had just been voted upon by the majority of the townspeople.[30] Had this crime occurred just a few months prior, the guiding statute would not have allowed for such punishment.[31] Similarly, in a 1969 case, it was not considered cruel and unusual to mete out a severe sentence in a narcotics recidivism case, reflecting the social discomfort of addiction at that time, and the willingness of people to allow addicts to be imprisoned away instead of rehabilitated. The court in *People v. Jackson* stated that "[t]he penalty for the sale of narcotics subsequent to a prior offense is severe. It is the highest statutory punishment in Illinois for a recidivist offender. But illegal distribution of narcotics is wide-spread. It has many evils."[32] These cases highlight that what shocks the moral sense of community changes over time, and these changes are reflected in the case law, even without making changes to constitutional language.

The constitutional language did change in 1970, when the framers altered the text significantly to its current language: "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."[33] The proportionate penalties clause as amended in the 1970 Constitution has two sections. The first remains similar to that of the 1870 Constitution; framers in 1970 did not intend to make major substantive or stylistic alterations.[34] A change did occur from using the word "proportioned" to "determined" ("All penalties shall be determined…") but it is unclear if that edit was done with intent to shift away from alignment with the Eighth Amendment's cruel and unusual clause. The second clause within art. 1, § 11, that penalties must also be determined "with

29. People ex rel. Bradley v. Ill. State Reformatory, 36 N.E. 76, 79 (Ill. 1894).
30. People v. Elliott, 112 N.E. 300, 302 (Ill. 1916).
31. *Id.*
32. People v. Jackson, 253 N.E.2d 527, 536 (Ill. App. Ct. 1st Dist. 1969).
33. ILL. CONST. art. I, § 11, *see also* Balmer, *supra* note 22.
34. People v. Clemons, 968 N.E.2d 1046, 1056 (Ill. 2012).

the objective of restoring the offender to useful citizenship," was new in the construction of the 1970 Constitution.[35]

It is clear from a review of the report of proceedings that the framers of this clause intended to provide protections beyond that of the Eighth Amendment. The sponsor of the amendment, delegate Leonard Foster, offered the following over the course of the discussion of the amendment:

> [T]he purpose of this amendment is to clarify the constitutional language in regard to penalties. Traditionally the constitution has stated that a penalty should be proportionate to the nature of the offense. I feel that with all we've learned about phenology that somewhere along the line we ought to indicate that in addition to looking to the act that the person committed, we also should look at the person who committed the act and determine to what extent he can be restored to useful citizenship.[36]

When Illinois voters considered the proposed constitution in December 1970, an explanatory note to art. 1, § 11 advised voters that the amended language "adds the requirement that penalties be determined with the objective of rehabilitating the offender and in accordance with the seriousness of the offense."[37]

Just as earlier courts considered the moral and social norms accepted by the community in the century between 1870 and 1970, once the rehabilitative prong of the proportionate penalties clause was added to the Illinois Constitution, courts started to take into consideration the effects of trauma, poverty, mental health, and physical health in assessing the appropriateness of a punishment. This movement towards consideration of the offender as well as the offense not only mirrored the 1970 Illinois Constitution, but also the effects

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35. Brad Taylor, *Return to Rehabilitation: Illinois' Evolving Juvenile Sentencing Practices in Light of Miller v. Alabama*, 43 S. ILL. U. L.J. 403, 421 (2019).

36. 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1391 (1972). .Interestingly, Foster also quoted a popular satiric opera, The Mikado:

> I would point out to the members that there is now a constitutional standard of punishment. As Gilbert and Sullivan would say, 'Our object all sublime, we shall achieve in time to make the punishment fit the crime' and that is exactly what article 11 says. The punishment shall be proportionate to the crime. If there were no article 11, I wouldn't have to propose this amendment, but since article 11 sets forth as a sole criterion the offense, I offer this amendment so that courts in addition to the offense can consider the offender.

Id. at 1396.

37. 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2685 (1972).

of death penalty jurisprudence both in Illinois and in the United States Supreme Court as the concept of mitigation gained traction.[38]

III. EVOLVING HIGHER STANDARDS OF DECENCY IN ILLINOIS COURTS

Today, there are three frameworks by which Illinois evaluates proportionality challenges: 1) "shock the moral sense of the community" analysis; 2) cross-comparison analysis; and 3) "identical elements" analysis.[39] While cross-comparison and identical-elements analyses have only been used in the state's jurisprudence for the last thirty years, the "shock the moral sense of the community" analysis, as described above, has been used in Illinois since the late nineteenth century.[40] As society evolves, so too do the standards by which this measurement occurs. For example, in *People v. Gleckler*, a defendant's mitigating characteristics compelled the Illinois Supreme Court to lower the defendant's sentence.[41] *Gleckler* can be interpreted as an identical-elements comparison, where the court held that the defendant, who faced death, did not have "rehabilitative prospects demonstrably poorer than those who received imprisonment terms."[42] Yet the court went on to say that just because they had no sympathy for the defendant, and in fact had revulsion, that did not mean they could justify the death penalty.[43] Further, the court

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38. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (where the Court held that "Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . ."); *see also* Rompilla v. Beard, 545 U.S. 374, 393 (2005) (where trial counsel's failure to properly investigate family and social conditions for mitigation constituted ineffective assistance and reversed a death penalty sentence); Roper v. Simmons, 543 U.S. 551, 568 (2005) ("In any capital case a defendant has wide latitude to raise as a mitigating factor . . ."); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (where defendants with mental retardation may have a difficult time providing assistance with mitigation efforts, but the characteristic of them being mentally retarded must be considered a mitigating factor).

39. Kiley, *supra* note 28.

40. *Id.* The comparison-based analysis developed initially from the 1983 Illinois Supreme Court case *People v. Wisslead*, the first in which penalties imposed for a different offense were compared by the court. This analysis was not standalone, however, in that many courts refused to invalidate the greater penalty unless it also met the shock standard created in earlier cases. Later, in the 1990's, the court in *People v. Christy* developed the identical elements test, holding that "Since the elements . . . [of the two offenses] are identical, common sense and sound logic would seemingly dictate that their penalties be identical." People v. Christy, 564 N.E.2d 770, 774 (Ill. 1990). While all three analyses were embraced by the courts starting in the mid-1990s, the cross comparison analysis lost ground with *Sharpe*, in which the court held that they would "no longer use the proportionate penalties clause to judge a penalty in relation to the penalty for an offense with different elements." People v. Sharpe, 839 N.E.2d 492, 516 (Ill. 2005).

41. People v. Gleckler, 411 N.E.2d 849, 859 (Ill. 1980).

42. *Id.* at 171.

43. *Id.*

recognized the defendant's alcohol problem.[44] These considerations demonstrated the court's willingness to consider an evolving standard of decency. And while the Illinois Constitution appears to require more than the Eighth Amendment floor below which they may not fall, Illinois's evaluation of a proportionality challenge is in alignment with the United States Supreme Court.[45] As dictated by *Roper v. Simmons*, a court makes determinations using "objective indicia of society's standards, as expressed in legislative enactments and state practice . . . ."[46] There has been a progression, from *Gleckler* in 1980 to *Roper* to today. As more social science is woven into legal analysis, courts have more information with which they can make informed decisions regarding sentencing so that it meets the national consensus and does not violate the constitution.[47]

IV. HOW FAMILY LAW MAY INFORM ILLINOIS SENTENCING

In Illinois, the legislature has already at least once before, in response to shifts in society, developed a multi-step analysis to address complex concerns. Among the most complex decisions are those about what to do with children in a custody contest, and many of the ways in which family law has evolved to address competing concerns are relevant to and perhaps even directly applicable to those involved in sentencing.

The Illinois Marriage and Dissolution of Marriage Act (IMDMA)[48] includes a lengthy examination of overlapping contextual factors expected to be examined in each case in which there is a dispute regarding the Allocation of Parental and Decision-making Responsibilities regarding a minor child or children. Best interests of the minor child are determined by reviewing fourteen specific factors and one which is less specific, including the mental and physical health of the family, the violence or threat of violence towards the child, and any abuse towards the child or another child within the household.[49]

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44. *Id.*
45. People v. Gay, 960 N.E.2d 1272, 1279 (Ill. App. Ct. 4th Dist. 2011).
46. Roper v. Simmons, 543 U.S. 551, 563 (2005).
47. *Gay*, 960 N.E.2d at 1279.
48. 750 ILL. COMP. STAT. ANN. 5/101 (West 1990).
49. The full list of factors:

> 1. the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to decision-making.
> 2. the child's adjustment to his or her home, school, and community.
> 3. the mental and physical health of all individuals involved.
> 4. the ability of the parents to cooperate to make decisions, or the level of conflict between the parties that may affect their ability to share decision-making.

Because each instance of parent-child relationship is different and the circumstances of the parents' relationships between one another also varies, the court finds it most appropriate, in the interest of both justice and equity, to review each case and apply the factors accordingly. Obviously, not all of these considerations are relevant to the goal of restoring an offender to useful citizenship, but they do provide some guidance. For example, a sentencing court could look to these standards in deciding whether or not the offender had sufficient guidance at home, or whether there was trauma in the home that negatively impacted his or her development. In criminal law, these are "traditional" mitigating factors, but there is no requirement that the judge consider them sua sponte, that the probation department include inquiry into these issues for its pre-sentence report, or that failure to investigate them is necessarily ineffective assistance of counsel.[50]

The development of the family law guidance is a more recent legislative phenomenon. It was not until 1920 that the "welfare of [a] child" was given any consideration at all in domestic relations matters.[51] Barring any undefined issues of a child's welfare, fathers were given a presumption of custody. After World War II, and the societal shift from agrarian patriarchal family structures, to a newer format which included women in the workforce, there was a shift in determination of custody to include deference to mothers during the minor child(ren)'s "tender years."[52] Throughout the 1960s through

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> 5. the level of each parent's participation in past significant decision-making with respect to the child.
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> 6. any prior agreement or course of conduct between the parents relating to decision-making with respect to the child.
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> 7. the wishes of the parents.
>
> 8. the child's needs.
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> 9. the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement.
>
> 10. whether a restriction on decision-making is appropriate under Section 603.10;
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> 11. the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
>
> 12. the physical violence or threat of physical violence by the child's parent directed against the child
>
> 13. the occurrence of abuse against the child or other member of the child's household.
>
> 14. whether one of the parents is a sex offender, and if so, the exact nature of the offense and what, if any, treatment in which the parent has successfully participated; and any other factor that the court expressly finds to be relevant.

750 ILL. COMP. STAT. ANN. 5/602.7 (West 2016).

50. 730 ILL. COMP. STAT. ANN. 5/5-3-2 (West 2020).

51. Stafford v. Stafford, 217 Ill. App. 548, 551 (3d Dist. 1920).

52. Nye v. Nye, 105 N.E.2d 300, 301 (Ill. 1952).

the early 1970s, the "best interest" theory emerged. Unlike today's clear bullet pointed standard, this was a concept which led judges to sift through minutia of the family's lived circumstances to draft decisions based on their own perception of the child's best interest. This led, quite foreseeably, to unpredictable determinations. The Uniform Marriage and Divorce Act, ratified in 1974, included some guidance by way of a five point standard, but still frustrated many within the legal community.[53]

In the interest of both efficiency and efficacy the legislature used a multi-tiered approach to address this issue. First, it rejected any sex-based presumption of custodial parent determination. Second, it borrowed heavily from the Probate Courts with regard to determinations of "fitness" as used with protecting our other vulnerable populations. Lastly, it distilled relevant factors from litigation which had taken place and, noticing patterns, determined the fourteen factors that are most relevant for most cases. Yet and still, space was left with the catchall factor fifteen to allow for growth and change as it so became necessary for greatest fairness. In 2015, this test became law and since has provided clearer analysis for litigants, judges, and attorneys alike.

Just as probate and domestic relations courts have borrowed from one another in efforts to develop the best, most complete, and fair methods, the juvenile courts may utilize and modify these factors for the purposes of evaluating sentencing. In so doing, courts would ensure that they are actively considering the rehabilitation of the minor defendants.

V. PUBLIC POLICY

In order to understand whether the Illinois Constitution Art. 1, § 11 affords more protection than the Eighth Amendment of the United States Constitution, we must revisit both the framers' intent and how Illinois courts have interpreted Art. 1, § 11. It is undeniable that the framers in 1970 inserted "with the objective of restoring the offender to useful citizenship," into the clause in order to offer more protection within the Illinois Constitution than that offered by the Eighth Amendment.[54] The historical context has been addressed by the Illinois Supreme Court in their own consideration of whether or not Article I, Section 11 offers greater protection than the Eighth Amendment to the United States Constitution. Forty-two years after the amendment was ratified by a vote of the citizens of Illinois, the Illinois Supreme Court held in *People v. Clemons* that the protection was greater:

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53. Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449 (2005).

54. *See supra* Section II.

> [O]ur [prior] conclusion . . . that "article I, section 11 was synonymous with the cruel and unusual punishment clause of the eighth amendment" . . . is an overstatement. Although a relationship may exist between the first clause of article I, section 11, and the eighth amendment, that relationship is not entirely clear. What is clear is that the limitation on penalties set forth in the second clause of article I, section 11, which focuses on the objective of rehabilitation, went beyond the framers' understanding of the eighth amendment and is not synonymous with that provision.[55]

Since *Clemons*, this point of law has not been directly overruled or abrogated, but it has been called into doubt, and the Illinois Supreme Court issued a possibly inconsistent opinion. In *People v. Patterson*, the Court held that the Eighth Amendment and Illinois's proportionate penalties clause were "co-extensive," however the nature of the analysis was related to whether the automatic transfer was procedural, or whether it was in the realm of punishment (they held procedural).[56] It seems this was a categorical analysis in which they assigned the term "co-extensive" to the evaluation of procedure and punishment, rather than one where they were actually stating whether or not Illinois's clause provided more protection than the Eighth Amendment.

From this, some lower courts have interpreted the term "co-extensive" only in its applicability, not its protections offered. *People v. Gipson*, for example, interprets it that way:

> Our supreme court's decision in *Patterson* does not alter our determination. In addressing the defendant's facial challenge to the transfer statute under the eighth amendment, our supreme court found the defendant's challenge failed because the transfer statute did not itself impose actual punishment, as required to mount a successful eighth amendment challenge.[57]

Most recently, in *People v. Coty*, the Illinois Supreme Court observed that "appellate decisions, including the second in this case, have aptly pointed out that this court has not spoken consistently on the relationship between

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55. People v. Clemons, 968 N.E.2d 1046, 1057 (Ill. 2012); *see also* Taylor, *supra* note 35.

56. People v. Patterson, 25 N.E.3d 526, 551 (Ill. 2014).

57. People v. Gipson, 34 N.E.3d 560, 581 (Ill. App. Ct. 1st Dist. 2015).

our proportionate penalties clause and the eighth amendment."[58] The *Coty* Court held that "if a sentence passes muster under the proportionate penalties clause . . . then it would seem to comport with the contemporary standards of the eighth amendment."[59] *Coty's* "if, then" holding, stating that the proportionate penalties clause is in accord with the Eighth Amendment, can also be interpreted as supporting the framer's intent: more so than just "comporting" with the Eighth Amendment, the proportionate penalties clause protects an individual to a greater extent than the Eighth Amendment.

The Illinois Supreme Court's interpretation of the Illinois Constitution mandates a sentence be rehabilitative, which clearly sets a more protective standard than that of the Eighth Amendment.[60] And because the United States Supreme Court has noted that juveniles beyond rehabilitation are extremely rare,[61] it makes sense that juvenile sentencing should always reflect the Illinois Constitution's art. 1, § 11 focus on "restoring the offender to useful citizenship."

The recognition that the social history, medical history, and psychological condition of an offender has a role to play in sentencing comes primarily through death penalty jurisprudence, as well as that regarding juveniles.[62] Mitigation is a critical aspect of any juvenile case, and when it is employed successfully, it can guide sentencing efforts so that the rehabilitative goal of art. 1, § 11 is always upheld.

Seeking the necessary information to conduct successful mitigation can be difficult. But it is so important that, for juveniles and all defendants, attorneys seek to mitigate by providing evidence consistent with any theory regarding the client's lesser degree of culpability and by providing the sentencer with a full, reliable, and accurate understanding of the client. When the goals of successful mitigation investigation are met, this provides judges and juries with information that can inform their sentencing. Successful mitigation can help to ensure that the rehabilitative arm of art. 1, § 11 is considered.

VI. CONCLUSION

Illinois must live up to the promise made by its constitution, to sentence each individual with the goal of restoring that person to useful citizenship. Although Illinois has generally interpreted this section of its constitution in lockstep with the United States Constitution's Eighth Amendment, this has begun to change. Specifically, in light of *Miller v. Alabama* and *People v.*

58. People v. Coty, 2020 IL 123972, ¶ 45.
59. *Id.*
60. Taylor, *supra* note 35, at 429.
61. Roper v. Simmons, 543 U.S. 551 (2005).
62. *See* cases cited *supra* note 38.

Buffer, Illinois has started to more carefully consider a juvenile's special circumstances when determining an appropriate sentence. While the resultant Illinois cases may cast a perception that Illinois is in lockstep with the United States Constitution, the state is actually poised to offer more protection than that offered by the Eighth Amendment.

As the Illinois Constitution has evolved, so too can Illinois's sentencing decisions regarding juveniles. Over the course of a century, there was little change to the Illinois Constitution. Instead, courts interpreted the constitution using evolving standards of decency, based on social and moral norms of the times. However, when drafters of the 1970 Constitution approached the proportionate penalties clause, they did so with the desire to ensure that sentencing was meted "with the objective of restoring the offender to useful citizenship."[63] This also created an opportunity for courts to evolve, taking into consideration an individual's potential for rehabilitation as part of their sentencing for a crime. Just as Illinois Family law has evolved to require a court to take certain issues into account in determining placement of a child, so too should Illinois courts take relevant mitigating factors into account in meting out sentences—not just of juveniles—but of all offenders. Further, as a society we are just starting to recognize and accept the enormous and realistic impacts of systemic racism. The deleterious effects of poverty and exposure to violence are also real, and as a society we need to address these issues, both preventively and in response to the wrongs committed by those persons who violate our laws.

Children like Javier need our help before they are lured into gangs and crime, and their voices should be heard when they stray. Redemption should be our societal goal. As Javier said in a letter to the governor asking for a commutation of sentence:

> I spent so many years feeling sorry for myself. Always asking why me, what did I do to deserve this. Being selfish like I had most of my life. People in prison used to tell me that I got pretty messed up deal for something I did at such a young age and for many years I believed it. Then one day, the truth hit me and it hit me hard. From that point on, my view about a lot of things changed. Now, any time anyone says that I got a raw deal, I am quick to correct them and tell them that I got it easy. The young man that lost his life because of my actions; he received a raw deal. His family who suffered and continues to suffer because of me; they got it hard. I owe them more than an apology. I owe them everything . . .

63. ILL. CONST. art. I, § 11.

> Yes, I may be incarcerated for many years, but I am still alive. I get to see my family and friends and at some point, I will be given the opportunity to go home and have a life. I know that there will never be anything that I can do to change the past. I just want to live the rest of my life, however long that may be, worthy of everyone who has ever been hurt or wronged by my actions. I owe it to all of them to be the best version of myself and live a life that everyone can be proud of me for. I've spent most of my life focusing on all of the things I didn't have that I lost sight of everything I did have . . . I also spent so much of my life . . . always blaming someone else for all of my misfortune. Sometimes things happen. Things that shouldn't happen, but they do. I have learned to let go of the things that happened to me that were not my fault and I accept full responsibility for the things that happened to me as a direct result of my actions. These past twenty-two plus years of incarceration have been both difficult and a learning experience . . .
>
> I refuse to allow my poor choices define the rest of my life. I know that I will never discover the cure for cancer or end world hunger but I will spend whatever time that I have left in this world being a good person. I will strive each and every single day to be a good son, nephew, cousin, friend and, God willing, an amazing husband and father. Having a family of my own is the thing that I've wanted more than anything my whole life. My dream is to have the family I wished I had growing up. The final chapters of my life have not yet been written, but I intend to make them the best chapters of my life.[64]

If Illinois courts take this opportunity, this increased knowledge of the effects of the depredations of poverty, abuse, and lack of resources into account in making decisions as its constitution says, that would benefit us all. Illinois can take this step towards justice. We are well positioned and ready to do so.

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64. Letter from Javier to Governor (Oct. 2020).